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NOTES

Workers' Compensation—*Rutledge v. Tultex Corp./Kings Yarn*: Leaving Precedent in the Dust?

Considered one of the five most dangerous occupational substances,[1] cotton dust already has contributed to the disability of up to 11,000 textile workers in North Carolina.[2] Because most of these workers' disabilities cannot be completely attributed to their occupational exposure,[3] the issue of apportionment of workers' compensation awards according to occupational and nonoccupational causes is of great significance to workers, employers, and policy makers.[4]

The recent North Carolina Supreme Court case of *Rutledge v. Tultex Corp./Kings Yarn*[5] allows a plaintiff to be compensated fully even when his disease is caused in part by nonoccupational factors.[6] In a 4-3 decision, the court determined that apportionment of benefits is unnecessary when a worker's disability is caused completely by chronic obstructive lung disease to which occupational exposure has contributed significantly.[7] Crucial to the court's decision was its declaration that Rutledge's occupational disease was "chronic obstructive lung disease"[8] rather than the traditionally recognized occupational disease "byssinosis."[9] By characterizing chronic obstructive lung disease as an occupational disease, the court was able to avoid, and severely

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1. C. FRANKEL, 5A LAWYERS' MEDICAL CYCLOPEDIA, § 33.59a, at 24 (rev. ed. Supp. 1980) (800,000 workers nationwide risk byssinosis).

2. Ellis, *The Brown Lung Battle*, 4 N.C. INSIGHT 16, 16 (1981). *But see* Davis, *Chronic Obstructive Lung and Cardiovascular Diseases*, in N.C. BAR ASSOC. FOUNDATION, WORKERS' COMPENSATION VII-67 (1979) (strict scientific justification supports estimate of only 500).

3. *See* 1B A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 41.64(b), at 7-432 (1982) (byssinosis seldom occurs without history of smoking). *See also* Ellis, *supra* note 2, at 19 (statement of William Stephenson, Chairman, N.C. Indus. Comm'n) ("In more than 90% of the [cotton dust] cases that come before us, the claimants have some malady other than byssinosis.").

4. *See generally* Note, *Apportionment of Disabilities is Limited Under the North Carolina Act*, 54 N.C.L. REV. 1123 (1976).

5. 308 N.C. 85, 301 S.E.2d 359 (1983).

6. *Id.* at 101, 301 S.E.2d at 370.

7. *Id.* at 101, 301 S.E.2d at 369-70.

8. The broad term "chronic obstructive lung disease" describes a condition caused by one or more specific lung diseases (bronchitis, byssinosis, emphysema, etc.) which in their chronic stages are generally medically indistinguishable. *See id.* at 94, 301 S.E.2d at 366; A. BOUHUYS, J. SCHOENBERG, G. BECK & R. SCHILLING, *Epidemiology of Chronic Lung Disease in a Cotton Mill Community*, 5 TRAUMATIC MEDICINE AND SURGERY FOR THE ATTORNEY 607 (Service Vol. 1978).

9. "Byssinosis," commonly known as brown lung disease, is a bronchial irritation often found in workers exposed to cotton dust. While the disease frequently possesses unique characteristics in its acute stages, *see Survey of Developments in North Carolina Law, 1980—Administrative Law*, 59 N.C.L. REV. 1017, 1036 n.161 (1981) (describing the "classical history" of brown lung development), byssinosis in its chronic stages generally is considered to be medically indistinguishable from other specific chronic obstructive lung diseases. *Rutledge*, 308 N.C. at 94-95, 301 S.E.2d at 366.

limit the precedential value of, *Morrison v. Burlington Industries*,[10] which had required apportionment when the narrower occupational disease of byssinosis was found to be partially responsible for a plaintiff's disability.[11]

The *Rutledge* court's apparent departure from precedent sparked considerable controversy that began with the filing of a lengthy dissenting opinion and culminated in a legislative proposal designed to negate the *Rutledge* holding.[12] Although the effort to overrule *Rutledge* legislatively failed, the *Rutledge* rule has not settled the issue of apportionment in lung disease cases. Instead, by not expressly overruling the *Morrison* case and its progeny,[13] the *Rutledge* opinion has further complicated the already confusing workers' compensation law governing "dual causation."[14] This note examines the success and significance of the *Rutledge* court's attempts to reconcile its result with the *Morrison* apportionment rule.

Plaintiff Margaret Rutledge worked for twenty-three years in various cotton mills prior to her employment with defendant Kings Yarn in 1976.[15] Her pulmonary impairment began in 1969 with a cough at work and progressed until 1979 when it disabled her from all but "sedentary work . . . in a clean environment."[16] Rutledge had been exposed to respirable cotton dust in all of the mills, but her exposure was less severe in defendant's newer, cleaner mill than in the others.[17] She also smoked approximately one pack of cigarettes per day throughout her period of employment in the cotton industry.[18]

The Industrial Commission's pulmonary specialist diagnosed Rutledge as having "chronic obstructive pulmonary disease, with [elements] of pulmonary emphysema and chronic bronchitis."[19] He opined that plaintiff's exposure to cotton dust "probably was a cause" of her lung disease,[20] although cigarette smoking was "one of the more probable causes."[21] He also stated that her lung problems were "caused by circumstances which existed prior to her em-

10. 304 N.C. 1, 282 S.E.2d 458 (1981).

11. *Id.* at 13, 282 S.E.2d at 467.

12. *See infra* notes 91-94 and accompanying text.

13. Walston v. Burlington Indus., 304 N.C. 670, 285 S.E.2d 822 (1982), *amended on reh'g*, 305 N.C. 296, 285 S.E.2d 822 (1982); Hansel v. Sherman Textiles, 304 N.C. 44, 283 S.E.2d 101 (1981). For a detailed discussion of *Morrison* as well as these cases, see Note, *You Take (45% of) my Breath Away*—Morrison v. Burlington Industries, 4 CAMPBELL L. REV. 107 (1981) [hereinafter cited as Note, *(45% of) my Breath]*; Note, *Apportionment of Disability Compensation*—Morrison v. Burlington Industries, 18 WAKE FOREST L. REV. 801 (1982) [hereinafter cited as Note, *Apportionment*].

14. "Dual causation" refers to the causation problem when a personal element such as smoking combines with an employment element to produce lung disease. A. LARSON, *supra* note 3, § 41.64(a), at 7-424.

15. *Rutledge*, 308 N.C. at 87, 301 S.E.2d at 361-62.

16. *Id.* at 87, 301 S.E.2d at 362.

17. *Id.*

18. *Id.* at 87, 301 S.E.2d at 361.

19. *Id.* at 87, 301 S.E.2d at 362.

20. *Id.* at 90-91, 301 S.E.2d at 363. The expert also stated that Rutledge did "not give a classical history of byssinosis," *id.* at 123, 301 S.E.2d at 382 (Meyer, J., dissenting), although he admitted that textile workers are at an increased risk of developing chronic lung disease "irrespective" of whether they show such a history, *id.* at 112, 301 S.E.2d at 376 (Meyer, J., dissenting).

21. *Id.* at 92, 301 S.E.2d at 364.

ployment [by Kings Yarn],"[22] although plaintiff's Kings Yarn exposure could have had "some [minimally] aggravating effect on [her] underlying condition."[23] The Deputy Industrial Commissioner determined that because Rutledge's exposure at Kings Yarn had "neither caused nor significantly contributed" to plaintiff's disease,[24] she had "not contracted chronic obstructive lung disease as a result of any exposure while working with defendant employer."[25] The full Industrial Commission subsequently adopted the deputy's findings and conclusion as its own.[26]

The North Carolina Court of Appeals found that the Commission had erred in requiring Rutledge to prove that her last employment had caused an occupational disease rather than simply allowing her to prove it to have been the last job to injuriously expose her to cotton dust.[27] The court found the error harmless, however, because the court agreed with the Commission's conclusion that the plaintiff had not contracted an occupational disease.[28]

The North Carolina Supreme Court agreed with the court of appeals that the Commission had erred in requiring Rutledge to prove that exposure at her last employment had done anything more than "proximately [augment] her disease to any extent, however slight."[29] A majority of the supreme court disagreed that the error was harmless, however, because they believed that sufficient evidence existed to support a finding that Rutledge's chronic obstructive lung disease was a compensable occupational disease.[30] Over a lengthy and vigorous dissent, the majority held that a worker could be compensated to the full extent of disability caused by chronic obstructive lung disease[31] if her cotton dust exposure significantly contributed to that disease.[32]

Although North Carolina recognized compensable occupational diseases as early as 1935,[33] byssinosis has never appeared on the statutory list of prima facie occupational diseases.[34] Cotton dust claimants therefore found it neces-

22. Rutledge v. Tultex Corp./Kings Yarn, 56 N.C. App. 345, 347, 289 S.E.2d 72, 73 (1982), *rev'd on other grounds*, 308 N.C. 85, 301 S.E.2d 359 (1983).

23. *Id.* at 347, 289 S.E.2d at 73.

24. *Rutledge,* 308 N.C. at 88, 301 S.E.2d at 362.

25. *Id.*

26. *Id.*

27. *Rutledge,* 56 N.C. App. at 350, 289 S.E.2d at 74.

28. *Id.* It does not appear that the Commission reached such a conclusion. The Commission merely had ruled that Rutledge had not contracted an occupational disease as a result of her exposure at defendant's plant. *See* New Supreme Court Brief for Appellant at 15, *Rutledge*, 308 N.C. 85, 301 S.E.2d 359 (1983).

29. *Rutledge,* 308 N.C. at 89, 301 S.E.2d at 362.

30. *Id.* at 90, 301 S.E.2d at 363. Chronic obstructive lung disease was found to meet the requirements of North Carolina's catch-all occupational disease provision, N.C. GEN. STAT. § 97-53(13) (1979). *See infra* text accompanying note 35.

31. *Rutledge,* 308 N.C. at 107, 301 S.E.2d at 373.

32. *Id.* at 101, 301 S.E.2d at 369-70.

33. Act of March 26, 1935, ch. 123, § 1, 1935 N.C. Sess. Laws 130. For a discussion of the gradual development of workers' compensation law in this area, see Note, *Development of North Carolina Occupational Disease Coverage*, 7 WAKE FOREST L. REV. 341 (1971).

34. *See* N.C. GEN. STAT. § 97-53 (1979). Prima facie occupational diseases in North Carolina include asbestosis, *id.* § 97-53 (24), and silicosis, *id.* § 97-53 (25), as well as diseases such as carbon monoxide poisoning, *id.* § 97-53 (22), which are not purely occupational in nature.

sary to rely on North Carolina's catch-all provision, which currently deems occupational "any disease . . . proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, or employment but excluding all ordinary diseases of life to which the general public is equally exposed."[35] In 1979, after the catch-all provision had been amended three times[36] and clarified in *Booker v. Duke Medical Center*,[37] the North Carolina Supreme Court finally recognized byssinosis as an occupational disease.[38]

The *Booker* court determined that the occupational exposure need not be the sole originating cause of a worker's disease for that disease to be compensable.[39] But the issue of *how much* compensation would be allowed when a worker's diseases were caused by both occupational and nonoccupational factors was not squarely addressed by the supreme court until *Morrison v. Burlington Industries*.[40] Despite finding that plaintiff was permanently and totally disabled, the court in *Morrison* awarded compensation for only permanent partial disability because only part of plaintiff's disability had been caused by occupational factors.[41] The court ruled that the Industrial Commission was correct in apportioning Morrison's recovery according to the percentage of her disability caused, aggravated, or accelerated solely by occupational factors.[42]

The *Morrison* court failed to identify clearly the occupational disease before it. Although plaintiff's claim sought compensation for "an occupational disease—to wit, byssinosis,"[43] the Commission and the court followed the lead of the medical experts, consistently referring to her incapacity to work as being caused by "chronic obstructive lung disease due in part to cotton dust exposure."[44] It is uncertain whether the court intended this phrase to mean byssinosis, an occupational disease which was to be fully compensated because it constituted that portion of plaintiff's chronic obstructive lung disease caused by her occupational exposure, or whether the court recognized chronic obstructive lung disease as a separate occupational disease, which would be com-

35. *Id.* § 97-53(13).

36. *See* Note, *Redefinition of Occupational Disease and the Applicable Compensation Statute*—Booker v. Duke Medical Center *and* Wood v. J.P. Stevens & Co., 16 WAKE FOREST L. REV. 288, 289 (1980).

37. 297 N.C. 458, 256 S.E.2d 189 (1979).

38. Wood v. J.P. Stevens & Co., 297 N.C. 636, 256 S.E.2d 692 (1979) (error for lower court to take judicial notice that byssinosis was not a compensable occupational disease).

39. *Booker*, 297 N.C. at 473, 256 S.E.2d at 199.

40. 304 N.C. 1, 282 S.E.2d 458 (1981). A student commentator stated that the issue of apportionment was "[p]erhaps the most significant issue presented to the [North Carolina] courts in 1981." *Survey of Developments in North Carolina Law, 1981—Administrative Law*, 60 N.C.L. REV. 1164, 1194-95 (1982).

41. *Morrison,* 304 N.C. at 6-7, 282 S.E.2d at 463.

42. *Id.* at 13, 282 S.E.2d at 467. Apportionment was permitted even though a similar rule had been rejected for accident claims. *See* Little v. Anson County Schools Food Serv., 295 N.C. 527, 246 S.E.2d 743 (1978). While admitting to forming a dichotomy, the *Morrison* court felt that extending accident law to diseases was a legislative function. *Morrison,* 304 N.C. at 19, 282 S.E.2d at 470. This conclusion was criticized in Note, *(45% of) my Breath*, *supra* note 13, at 123.

43. *Morrison,* 304 N.C. at 2, 282 S.E.2d at 461.

44. *E.g., id.* at 8, 282 S.E.2d at 464.

pensated only partially according to the disease's work related components.[45] This ambiguity surrounding the phrase "chronic obstructive lung disease" later would provide the loophole through which the *Rutledge* majority would reconcile its opinion with *Morrison*.

In a lengthy dissent to the *Morrison* opinion, Justice Exum stated that neither precedent[46] nor the facts supported the majority's position. In Exum's view, no apportionment was necessary because Morrison's chronic obstructive lung disease—an occupational disease in its own right—was completely responsible for her disability,[47] and because her cotton dust exposure had "significantly contributed" to that ultimate disease.[48]

In *Hansel v. Sherman Textiles*,[49] decided the same day as *Morrison*, the supreme court recognized byssinosis as an occupational disease,[50] but refused to allow recovery of full benefits because part of plaintiff's disability was attributable to asthma and chronic bronchitis, which were not occupational in origin.[51] The majority, relying heavily on *Morrison*, remanded the case to the Industrial Commission for determination of the relative contributions of occupational and nonoccupational factors to Hansel's disability.[52] In a separate concurring opinion, Justice Exum reiterated his "significant contribution to the ultimate disease" standard[53] and noted the problems inherent in the Industrial Commission's attempt to scientifically assign percentages to causes of lung disease that are medically indistinguishable when in the chronic stages.[54]

The commentators' reactions to the majority opinions in *Morrison* and *Hansel* were almost unanimously negative.[55] Despite the critics' opposition to the apportionment rule and the lower court's difficulty in applying it,[56] the rule continued to be binding. The most recent pre-*Rutledge* opinion of the

45. The "components" of chronic obstructive lung disease include pulmonary emphysema, chronic bronchitis, and possibly asthma, as well as byssinosis. *Rutledge,* 308 N.C. at 92, 301 S.E.2d at 364.

46. *Morrison,* 304 N.C. at 24-34, 282 S.E.2d at 473-79 (Exum, J., dissenting). For a pre-*Morrison* review of North Carolina law supporting Exum's conclusions, see Note, *supra* note 4.

47. *Morrison,* 304 N.C. at 19, 282 S.E.2d at 470-71 (Exum, J., dissenting).

48. *Id.* at 44, 282 S.E.2d at 484 (Exum, J., dissenting). The significant contribution test had been previously suggested in Note, *Compensating Victims of Occupational Disease*, 93 HARV. L. REV. 916, 932 (1980).

49. 304 N.C. 44, 283 S.E.2d 101 (1981).

50. *Id.* at 48, 283 S.E.2d at 103.

51. *Id.* at 53, 283 S.E.2d at 106.

52. *Id.* at 58-59, 283 S.E.2d at 109.

53. *Id.* at 64, 283 S.E.2d at 112 (Exum, J., concurring).

54. *Id.* at 66, 283 S.E.2d at 113 n.8 (Exum, J., concurring).

55. *See, e.g.,* A. LARSON, *supra* note 3, § 41.64(c), at 7-436 n.87 (Supp. 1983) ("remarkable" that *Morrison* court apportioned without an express apportionment statute); Note, *(45% of) my Breath*, *supra* note 13, at 125 (*Morrison* departs from precedent, creates an artificial distinction between accident and disease claims, and usurps legislature's function). For a somewhat more favorable critique, see Note, *Apportionment*, *supra* note 13, at 820 (*Morrison* rule consistent with purposes of Workers' Compensation Act, although a departure from precedent).

56. *See, e.g.,* Hyatt v. Waverly Mills, 56 N.C. App. 14, 286 S.E.2d 837 (1982) (*Morrison* does not require remand for apportionment when expert unable to assign percentages to relative contributions); Anderson v. Smyre Mfg. Co., 54 N.C. App. 337, 283 S.E.2d 433 (1981) (no apportionment required despite clear history of smoking). *See also* Note, *Apportionment*, *supra* note 13, at 809 (courts often simply defer to the Commission's evaluation of testimony).

North Carolina Supreme Court on the cotton dust issue was *Walston v. Burlington Industries*.[57] The pulmonary expert in *Walston* diagnosed the plaintiff as having "possible" byssinosis that "could possibly" have played a role in causation but which was more likely to have played a contributory role.[58] The court affirmed the Industrial Commission's finding that Walston did not have an occupational disease.[59]

Finally writing for the majority, Justice Exum in *Rutledge* avoided the apportionment rule by distinguishing *Morrison* and *Hansel*, despite Rutledge's own argument in her court of appeals brief to the effect that *Rutledge* and *Morrison* had "very similar facts."[60] Stating that the commission and court in *Morrison* and *Hansel* had found the claimants' occupational diseases to be byssinosis rather than chronic obstructive lung disease,[61] Exum characterized *Rutledge* as a case of first impression: "[the] question now clearly before us for the first time is whether a textile worker's chronic obstructive lung disease may be an occupational disease. . . ."[62] The *Rutledge* majority answered this question affirmatively, holding that a disease may be occupational if the worker's exposure has contributed significantly to it.[63] The court then remanded the case to the Industrial Commission to determine whether Rutledge's years of textile labor had contributed significantly to her chronic obstructive lung disease, and instructed the Commission that apportionment would be unnecessary if the significant contribution standard were satisfied.[64] The court distinguished *Walston* on the ground that Rutledge's cotton dust exposure was a "probable," rather than "possible," cause of her disease.[65]

Justice Meyer, joined by two others in dissent,[66] persuasively argued that the majority's attempts to avoid *Morrison*, *Hansel*, and *Walston* "subtly but effectively" overruled them.[67] The dissenters believed that chronic obstructive lung disease was "not a specific disease in and of itself"[68] and should not have been classified as an occupational disease. They argued that if the *Rutledge* court had examined the plaintiff's specific lung diseases—as previous courts

57. 304 N.C. 670, 285 S.E.2d 822 (1981), *amended on reh'g*, 305 N.C. 296, 285 S.E.2d 822 (1982).

58. *Id.* at 672, 285 S.E.2d at 824.

59. Justices Exum and Carlton concurred separately without opinion, apparently satisfied that Exum's significant contribution threshold had not been crossed.

60. Plaintiff's Court of Appeals Brief at 7, *Rutledge*, 56 N.C. App. 345, 289 S.E.2d 72 (1982). At the time of plaintiff's statement the North Carolina Supreme Court had not yet reversed the court of appeals decision in *Morrison*, which *supported* Rutledge's claim.

61. *Rutledge,* 308 N.C. at 100, 301 S.E.2d at 369. Justice Exum previously had reached the opposite conclusion about the *Morrison* majority's holding. In *Hansel* Exum stated in his concurring opinion that "although Morrison claimed benefits for . . . byssinosis . . ., this Court identified her occupational disease as chronic obstructive lung disease." *Hansel,* 304 N.C. at 61, 283 S.E.2d at 110 (Exum, J., concurring).

62. *Rutledge,* 308 N.C. at 100-01, 301 S.E.2d at 369.

63. *Id.* at 101-02, 301 S.E.2d at 369-70.

64. *Id.* at 107, 301 S.E.2d at 373.

65. *Id.* at 108, 301 S.E.2d at 373.

66. Meyer was joined by Chief Justice Branch and Justice Copeland. All three had been in the *Morrison*, *Hansel*, and *Walston* majorities.

67. *Rutledge,* 308 N.C. at 109, 301 S.E.2d at 374 (Meyer, J., dissenting).

68. *Id.* at 121, 301 S.E.2d at 381 (Meyer, J., dissenting).

had done—the majority would have found that occupational exposure had contributed to some of Rutledge's diseases (*e.g.*, byssinosis) and not to others (*e.g.*, emphysema).[69] By lumping all of Rutledge's specific lung diseases under one generic term (chronic obstructive lung disease) and permitting the generic term to qualify as an occupational disease, the majority necessarily reached the conclusion that plaintiff's occupational exposure had contributed to her disabling disease—if it had contributed to a component, it had contributed to the whole. The dissenters called this analysis a "word trick,"[70] arguing that *Rutledge* was not distinguished from its predecessors by a difference in facts but rather by what the majority had chosen to label the occupational disease.

Although *Rutledge's* departure from the precedent established by *Morrison* and *Hansel* can be explained by the change in the membership of the North Carolina Supreme Court,[71] that explanation adds little to an understanding of the law. By distinguishing *Morrison* and *Hansel* without overruling them, the *Rutledge* majority intimated that apportionment may still be appropriate in some cases. The critical question remaining after *Rutledge* is: under what circumstances is apportionment still required? *Rutledge* "in effect overruled *Morrison's* apportionment rule in any case in which it is found that the [plaintiff's] disability was entirely caused by chronic obstructive lung disease."[72] It may be argued, however, that apportionment still is required if the worker's disability is not caused entirely by chronic obstructive lung disease, or if his occupational disease is identified as byssinosis rather than chronic obstructive lung disease.

The *Rutledge* majority conceded in dicta that apportionment would be permissible if nonoccupational, nonpulmonary ailments "contributed independently" to a plaintiff's incapacity to work.[73] The court did not provide any examples of such "independent contributing factors," or explain how the Industrial Commission might recognize them. Some clues to the meaning of the term may be gleaned, however, from the *Morrison* court's majority and dissenting opinions. In *Morrison* plaintiff's lung difficulties prompted her employer to transfer her to a dust-free environment where she was required to stand while working. Because of her preexisting phlebitis, Morrison was unable to work standing up, and thus was totally disabled from working in any part of the textile plant.[74] The *Morrison* majority identified phlebitis, varicose veins, and diabetes as independent contributing factors, requiring apportion-

69. *Id.* at 125, 301 S.E.2d at 383 (Meyer, J., dissenting). Emphysema was noted specifically as being scientifically incapable of occupational causation, aggravation, or acceleration.

70. *Id.* They also disagreed with the majority's characterization of *Walston* as a "possible cause" case and *Rutledge* as a "probable cause" case, calling it a "distinction without a difference." *Id.* at 128, 301 S.E.2d at 385 (Meyer, J., dissenting).

71. Justices Huskins and Britt, both of whom had been in the 5-2 majorities of *Morrison*, *Hansel*, and *Walston*, were replaced by Justices Mitchell and Martin in 1982. Justice Carlton, who had joined in the previous Exum opinions, was replaced by Justice Frye in 1983. All three new justices joined Exum in his majority opinion in *Rutledge*. It is possible that Exum did not expressly overrule *Morrison* in order to retain the majority needed to defeat apportionment.

72. A. LARSON, *supra* note 3, § 41.64(c), at 7-436 n.87 (Supp. 1983).

73. *Rutledge,* 308 N.C. at 108, 301 S.E.2d at 374.

74. *Morrison,* 304 N.C. at 7 n.2, 282 S.E.2d at 464 n.2 (Finding of Fact 6).

ment because they had contributed to her disability without having been caused, aggravated, or accelerated by her employment.[75] The *Morrison* dissenters, in an opinion written by Justice Exum, argued that plaintiff's phlebitis was not an independent contributing factor and should not be apportioned out. They maintained that the phlebitis could not have contributed independently to plaintiff's disability because that disease alone had never kept her from working,[76] and asserted that Morrison's lung disease was entirely responsible for her disability.[77]

The *Rutledge* majority opinion, also written by Exum, did not adopt expressly the *Morrison* dissent's description of independent contributing factors, but did employ implicitly the same standard. By construing the Industrial Commission's findings to mean that Rutledge's disability was due "entirely" to her pulmonary disease,[78] and by excluding plaintiff's significant nonpulmonary factors from the scope of the Commission's consideration of the case on remand,[79] the *Rutledge* majority in effect used the independent contribution standard described in the *Morrison* dissent, and ignored the standard appearing in the *Morrison* majority opinion.

If the North Carolina Supreme Court expressly adopts the *Morrison* dissenters' independent contribution standard in some future case, that decision will have far-reaching consequences. The new standard may be expected to shift the burden of proof to the employer, forcing him to prove independent causation (actual loss of work due to the independent source) rather than merely contribution.[80] Strict adherence to the independent contribution standard would restrict severely apportionment of benefits due to nonoccupational ailments, and might prevent apportionment altogether in multiple pulmonary disease cases[81] even if a scientifically accurate test were developed that could differentiate occupational and nonoccupational lung diseases.[82]

An interesting question is raised when one considers whether, after *Rutledge*, apportionment still is required when the Industrial Commission declares a plaintiff's occupational disese to be byssinosis rather than chronic obstructive lung disease. Because *Rutledge* did not overrule *Morrison* and *Hansel*, one must assume that other components of chronic obstructive lung disease, such as chronic bronchitis and pulmonary emphysema, nonoccupational in their origin, would be apportioned out as separate diseases unless

75. *Id.* at 5, 282 S.E.2d at 462. There is some ambiguity about whether the court actually factored out the non-lung-related causes. *See id.* at 21-22, 282 S.E.2d at 471-73 (Exum, J., dissenting).

76. *Id.* at 19, 282 S.E.2d at 470 (Exum, J., dissenting).

77. *Id.* at 19, 282 S.E.2d at 470-71 (Exum, J., dissenting).

78. *Rutledge,* 308 N.C. at 108, 301 S.E.2d at 374. The Commission did not use the word "entirely," but simply stated that plaintiff was disabled "because of her pulmonary impairment." Record on Appeal at 3.

79. *Rutledge,* 308 N.C. at 108-09, 301 S.E.2d at 374.

80. *See id.* at 101, 301 S.E.2d at 369-70.

81. The *Rutledge* majority opinion suggests that apportionment is permissible only when the independent contributing factors are nonpulmonary diseases. *Id.* at 108, 301 S.E.2d at 374.

82. *See, e.g.,* A. LARSON, *supra* note 3, § 41.64(b), at 7-430 (Dr. Selikoff's 1972 medical breakthrough enabled doctors to distinguish between cancer and asbestosis).

they had been aggravated or accelerated by the plaintiff's occupational exposure. Rather than affirming that the Industrial Commission *could* have found that chronic obstructive lung disease was occupational, as it did in *Rutledge*, the court, to prevent apportionment in such a case, would have to rule that the Commission *must* find chronic obstructive lung disease to be the occupational disease and byssinosis merely one of its components, rather than a separate disease. Such a decision would mandate that much of *Morrison* and *Hansel* be overruled *explicitly*.

The court already may be headed in that direction. In *Dowdy v. Fieldcrest Mills, Inc.*,[83] handed down after *Rutledge*, the court determined that for statute of limitations purposes, plaintiff had been disabled by an occupational disease (chronic obstructive lung disease) in 1973,[84] although he was not informed of his occupational disease (byssinosis) until 1974.[85] In rejecting plaintiff's argument that he had been informed of a different occupational disease than he had contracted, which prevented the start of the statute of limitations period, the court said:

> [W]e think it unimportant here to determine whether byssinosis is a particular type of chronic obstructive lung disease or a separate disease often found in conjunction with or evolving from chronic obstructive lung disease. For purposes of awarding workers' compensation benefits, there is no practical difference between chronic obstructive lung disease and byssinosis . . . .[86]

The *Dowdy* dicta seems to retreat from the sharp distinction between the two diseases that enabled *Rutledge*'s majority to reject apportionment without expressly overruling *Morrison*. The language provides future courts with a basis for reading chronic obstructive lung disease into a future commission finding of byssinosis in order to prevent apportionment.[87]

Rutledge appears to return North Carolina to the nonapportionment rule espoused in pre-*Morrison* North Carolina decisions[88] and in the majority of

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83. 308 N.C. 701, 304 S.E.2d 215 (1983).

84. *Id.* at 708, 304 S.E.2d at 220. The court stated that Dowdy's occupational disease was chronic obstructive lung disease, despite the fact that his claim was filed for byssinosis and the Industrial Commission had referred to his occupational disease as byssinosis. Dowdy v. Fieldcrest Mills, Inc., 59 N.C. App. 696, 697, 298 S.E.2d 82, 83 (1982), *rev'd on other grounds*, 308 N.C. 701, 304 S.E.2d 215 (1983).

85. *Dowdy*, 308 N.C. at 711-12, 304 S.E.2d at 221. In a separate concurring opinion, the *Rutledge* dissenters argued that it was unnecessary for the *Dowdy* majority to decide that chronic obstructive lung disease, diagnosed in 1973, was the plaintiff's occupational disease. Because Dowdy was informed of his byssinosis in 1974, and because the statute of limitations would have barred a cause of action arising in 1973 or 1974, there was "absolutely no reason to select the date of 1973 except to fortify the language of *Rutledge* . . . ." *Id.* at 717, 304 S.E.2d at 224 (Meyer, J., dissenting).

86. *Id.* at 712, 304 S.E.2d at 222.

87. It was unnecessary for *Dowdy* to explicitly overrule *Morrison*. Because Dowdy's claim was barred, no apportionment was possible.

88. *See, e.g.*, Little v. Anson County Schools Food Serv., 295 N.C. 527, 246 S.E.2d 743 (1978) (no apportionment when industrial accident combines with nonoccupational infirmities, such as age and education, to cause disability); Mabe v. North Carolina Granite Corp., 15 N.C. App. 253, 189 S.E.2d 804 (1972) (no apportionment when the 40% disability caused by silicosis combined with nonoccupational factors to cause total disability); Self v. Starr-Davis Co., 13 N.C. App. 694,

other jurisdictions.[89] Generally, compensation is not determined by examining the relative contributions of multiple lung diseases "except in states having special statutes on aggravation of disease."[90] The controversy surrounding *Rutledge* led to an attempt to enact just such a special statute in North Carolina. Claiming that economic hardship would result from the *Rutledge* decision,[91] textile manufacturers sought legislative relief.[92] A bill was introduced in the senate and sent to committee,[93] where hearings were held but no action was taken.[94]

Rutledge's rule requiring full compensation whenever a plaintiff's employment has contributed significantly to his occupational disease is a fairer approach to workers' compensation than *Morrison*'s apportionment rule. The difficulties in administering a rule of legal liability based on a scientifically inaccurate standard of apportionment, together with the compromises inherent in the workers' compensation system, would seem to call for a rule of liberal construction of the occupational disease statutes.[95] *Rutledge*'s rule of full

187 S.E.2d 466 (1971) (no apportionment when asbestosis accelerates and contributes to death by brain tumor). *See generally* Note, *(45% of) My Breath*, *supra* note 13, at 115 (prior to *Morrison*, North Carolina appellate courts consistently rejected apportionment unless the apportionment statute specifically applied).

89. *See* Note, *(45% of) My Breath*, *supra* note 13, at 122-24. North Carolina may be the only state to judicially apportion pathology. *See* Ellis, *supra* note 2, at 20 (statement of Charles E. Hassell, attorney for plaintiff in *Morrison*). The concept of apportionment was expressly rejected in the landmark case of Pullman Kellog v. Workers' Compensation Appeals Bd., 26 Cal. 3d 450, 605 P.2d 422, 161 Cal. Rptr. 783 (1980). *See also Rutledge*, 308 N.C. at 104, 301 S.E.2d at 371 (citing cases from other jurisdictions rejecting apportionment).

90. 2 A. LARSON, *supra* note 3, § 59.22, at 10-365. *See also* Note, *(45% of) My Breath*, *supra* note 13, at 123-24 (North Carolina legislature's failure to amend the Workers' Compensation Act to provide for apportionment in occupational disease cases after the *Mabe* decision indicates that the legislature intended to prevent apportionment).

91. *See* Raleigh News and Observer, May 8, 1983, at 8A, col. 4. (executive director of N.C. Textile Mfrs. Ass'n. estimates *Rutledge* decision could cost industry up to $200 million). These costs are now being borne by the textile workers or by another compensation system. *See, e.g.*, OCCUPATIONAL SAFETY AND HEALTH REP., October 15, 1981, at 388 (study showing that 95% of byssinotics receive Social Security payments; only 5% receive workers' compensation awards).

As an alternative to seeking legislative relief from the *Rutledge* holding, textile manufacturers could minimize the financial impact of *Rutledge* by refusing to hire smokers. *See* A. LARSON, *supra* note 3, § 41.64(c), at 7-432 n.83.1 (employment discrimination against smokers is legal and has been implemented by Johns-Manville). Adoption of such a policy now, however, would not reduce their retroactive liability. Long-term liability also will be reduced by recently enacted strict OSHA standards. *See* 29 C.F.R. § 1910.1043 (1982); *see also* 4A R. GRAY, ATTORNEY'S TEXTBOOK OF MEDICINE 205E-6 (3d ed. 1983). Nonetheless, their enactment without regard to cost-benefit analysis—upheld in American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490 (1981)—no doubt will increase the employers' costs in the short run.

92. Retired North Carolina Supreme Court Justice Huskins, author of the *Morrison* and *Walston* opinions, was hired to draft a bill to nullify *Rutledge* and mandate apportionment. Raleigh News and Observer, May 5, 1983, at 1A, col. 4. Huskins' bill received local press attention and prompted a crowd of byssinosis victims to demonstrate their opposition by marching inside the state legislature building, forcing the legislators to take a personal look at the victims' extensive disabilities. *Id.*, May 19, 1983, at 1C, cols. 2-3.

93. *See* N.C. Sen. Bill 471 (1983). The bill as introduced did not achieve its stated purpose. The occupational disease provision merely reiterated the language of *Morrison*, enabling it to again be circumvented by naming chronic obstructive lung disease as the occupational disease. Moreover, the bill went beyond *Rutledge*, extending the doctrine to nontextile workers and requiring apportionment of industrial accident cases as well. *Id.*

94. Raleigh News and Observer, May 19, 1983, at 1C, col. 3.

95. *See* Edes, *Compensation for Occupational Diseases*, 31 (10) LAB. L.J. 595, 599 (1980);

compensation obtained through such liberal construction does not threaten to turn the North Carolina Workers' Compensation Act into "general accident and health insurance," as the dissenters feared, for it is tempered by the requirement that the plaintiff prove that his employment exposure *significantly* contributed to his disability. That Justice Exum concurred in the *Walston* decision denying plaintiff's occupational disease claim implies that not every case will meet this significant contribution test, making *Rutledge* truly a "balance."[96]

Although *Rutledge* seems to return North Carolina to the majority and better view of occupational disease compensation, the court's hesitancy to expressly overrule *Morrison* leaves the law in a state of confusion at a time when clarity is sorely needed.[97] At its earliest opportunity, the court should clarify the distinction, if any, between byssinosis and chronic obstructive lung disease for apportionment purposes, admitting the court's significant legal and philosophical differences with *Morrison* and *Hansel*.[98]

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Note, *supra* note 48, at 925 (occupationally diseased workers do not receive equitable trade-off when they relinquish right to sue employers).

96. *Rutledge,* 308 N.C. at 105, 301 S.E.2d at 371. A Commission finding of probable employment contribution should lead to full recovery, while one of merely "possible" contribution would preclude any recovery.

See Swink v. Cone Mills, Inc., — N.C. App. —, 309 S.E.2d 271 (1983) (reversing on rehearing the pre-*Rutledge* decision in Swink v. Cone Mills, Inc., 61 N.C. App. 475, 300 S.E.2d 848 (1983)). The earlier *Swink* case had upheld an Industrial Commission denial of benefits to a worker who had been exposed to cotton dust for 38 years but who also had a history of smoking and tuberculosis. The court of appeals in the second case remanded the case to the Commission on the question of causation, correctly noting that a "mere possibility" of industrial aggravation, held insufficient to support plaintiff's claim in *Walston*, would not meet the *Rutledge* "significant contribution" test. *Id.* at —, 309 S.E.2d at 272.

97. The number of byssinosis-type claims has mushroomed in recent years. *See* Ellis, *supra* note 2, at 18 (913 filed in N.C. in 1970s, 684 in 1980 alone; up to 50% of these claims disputed).

98. Sufficient justification exists for overruling *Morrison* outright. As noted by the commentators, *Morrison* was a "strained and self-serving interpretation of precedent," Note, *Apportionment*, *supra* note 13, at 820, and could be overruled as an aberration in order to "reestablish North Carolina's progressive tradition in the field of workers' compensation law," Note, *(45% of) my Breath*, *supra* note 13, at 125. Perhaps more palatable would be to overrule *Morrison* on the basis of medical experts' refusals to assign percentages to the relative contributions of chronic lung diseases. These practical difficulties, the extent of which perhaps was not recognized fully by the *Morrison* court, could constitute changed circumstances—even since 1981—justifying *Morrison's* demise.